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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

ALEX K. HAHN, et al., Cross-complainants and Appellants, v. EDWARD KANG et al., Cross-defendants and Respondents.	A148515 (Alameda County Super. Ct. No. RG12-629895)

Alex Hahn, Hahn Development, LLC, and Hahn & Kang Equity I, limited partnership (collectively, Hahn) appeal from a judgment entered in favor of cross-defendants and respondents AMG & Associates, LLC, AMG Investment & Development Services, Inc., and Alexis Gevorgian (collectively, AMG). The dispute arose from AMG's agreement to buy from Hahn two vacant lots which AMG wanted to develop into a mixed-use residential and retail complex. Lingering contamination on the property complicated the deal and made the development effort more onerous and expensive. As a result, the parties entered into a series of agreements modifying their original agreement. One addendum affirmed Hahn's responsibility to address the contamination and made completing the environmental cleanup a condition precedent to AMG's closing of escrow. Another addendum was contingent upon AMG loaning Hahn $60,500 secured by a deed of trust for the property. A subsequent addendum purported to extend the repayment deadline for the $60,500 loan.

In addition, the deed of trust that secured the $60,500 loan included a provision obligating Hahn to pay all taxes and assessments affecting the property. In March 2012,

after Hahn had proven unable to pay delinquent property taxes and the property risked being sold at a tax auction, AMG paid over $200,000 in taxes. Based on Hahn's default, AMG demanded repayment of the entire loan pursuant to an acceleration clause in the deed of trust. When Hahn was unable to repay the loan, AMG foreclosed.

Hahn sued AMG, asserting multiple causes of action to set aside the foreclosure. After a bench trial, the trial court entered judgment in AMG's favor on all causes of action. Hahn appeals and argues there are several reasons why the trial court should have set aside the foreclosure or found AMG had breached their agreements. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Most of the following facts are taken from the Findings of Facts in the trial court's final statement of decision.

Hahn Development, LLC was a family entity comprised of Alex Hahn and his two sons, Allen Hahn and Charles Hahn. Alex Hahn served as general manager of Hahn & Kang Equity I, limited partnership, which included six investors from Hahn's family, and two additional investors from outside his family.

In 2003 and 2004, Hahn acquired undeveloped lots located at 4311 and 4317 MacArthur Boulevard in Oakland (the Property). In August 2005, AMG entered into an agreement to buy the Property from Hahn for $3.5 million. AMG intended to use the Property to develop a mixed-use residential and retail project.

On October 21, 2005, Hahn and AMG entered into the first of four addenda to the purchase agreement. Addendum No. 1 (Addendum 1), among other things, acknowledged that AMG disapproved of the physical condition of the Property, that the Property was not being sold "as is" with respect to its environmental condition, and that paragraph 14 of the purchase agreement reciting an "as is" sale of the Property "shall not apply to any environmental condition or contamination on the property. [Hahn] warrants and represents that it will deliver the Property, at close of escrow, free and clear of any Environmental Contamination," as defined in Addendum No.1. Addendum 1 also added new paragraph 40.1, which provided that "the close of escrow is contingent upon [Hahn] delivering environmental clearances to [AMG], to [AMG's] sole satisfaction, from all

agencies with applicable jurisdiction indicating that there is no environmental contamination on the [sic] or about the Property." A new paragraph 40.2 stated that "if required by any applicable jurisdiction, prior to close of escrow, [Hahn] agrees to remediate, cure, and correct all Environmental Contamination on the Property at [Hahn's] expense, except that [AMG] shall contribute up to 10% of the costs with a maximum contribution not to exceed $50,000."

On May 26, 2006, the parties executed a second addendum to the purchase agreement. Addendum No. 2 amended paragraph 39, item No. 3 of the purchase agreement to provide that "if [AMG] fails to obtain building entitlements and site plan approval within thirteen (13) months from the effective date, [AMG] may elect (but is under no obligation to do so), to cancel this contract."

On or around June 14, 2006, AMG and Hahn entered into Addendum No. 3 (Addendum 3). This addendum restated Paragraph 40.1 of the purchase agreement to provide that AMG's obligation to close escrow was contingent upon Hahn delivering environmental clearances or closure letters to AMG from all relevant regulatory agencies. Addendum 3 also amended the close of escrow to "on or before nine (9) months from the date of [AMG's] Approval of Environmental Clearances." Addendum 3 was contingent upon AMG lending Hahn $50,000 for two years with prepaid interest of $10,500 pursuant to a $60,500 promissory note and deed of trust to be secured by the Property (First Deed of Trust). Hahn executed the promissory note and First Deed of Trust. Hahn used the loan to pay an environmental remediation contractor for some earlier cleanup of the Property.

On February 25, 2008, AMG received notice from the City of Oakland (City) approving its plans for the Property. When a community group successfully appealed the decision, the City told AMG it could no longer proceed under a mitigated negative declaration. Because the Property was on the "Cortesi List" of hazardous materials sites, an environmental impact report (EIR) was necessary. AMG's principal, Alexis Gevorgian, told Hahn AMG did not want to pay for an EIR and that AMG would cancel

the escrow unless Hahn agreed to pay for this new level of environmental review. Rather than cancel, Hahn and AMG negotiated another addendum.

Addendum No. 4 (Addendum 4), dated December 2, 2009, made several changes to the purchase agreement. The purchase price was reduced from $3.5 million to $2,537,500 payable by a cash payment of $1,175,000 at close of escrow, less any loans Hahn had to repay AMG which were due on or before the closing. The balance of the purchase price was to be satisfied by AMG delivering to Hahn a grant deed for 2,969 square feet of retail space in the development once the City issued its certificate of occupancy. This addendum also affirmed Hahn's responsibility for the environmental cleanup. It extended the maturity date on the $60,500 loan an additional 24 months and gave Hahn the option "to repay the said loan by repaying out of the cash payment due to it upon the close of escrow."

Addendum 4 also discussed two additional loans. The second loan was to be a line of credit of up to $100,000 that Pacific Companies, one of AMG's business associates, would make available to Hahn to "be used for the sole purpose of completing any environmental documents and related legal fees that are required in order to meet the environmental approvals set forth by the City of Oakland and all other applicable agencies." The third was a potential loan from AMG to Hahn to be secured if, and only if, AMG elected to clean the Property after first giving Hahn the opportunity to do so and Hahn refused.

With all parties in agreement, AMG, not Pacific Companies, provided the second loan by establishing a line of credit for Hahn for up to $200,000. The promissory note for the credit line, dated March 1, 2010, stated that each draw from the funds "shall be for the sole purpose of government fees and the consulting reports required to process of the Environmental Review as required by the City of Oakland and Environmental Cleanup as required by the City of Oakland for the Project." The credit line was secured by a second deed of trust executed by Hahn and recorded in April 2010.

In early 2011, the parties began negotiating another potential loan from AMG to Hahn so that Hahn could pay off approximately $200,000 in delinquent property taxes.

The terms of the First Deed of Trust required Hahn to keep property taxes current, and if it failed to do so, AMG had the right, but not the obligation, to pay the taxes, and add the amount to the loan's principal balance. In May and June of 2011, Gevorgian transmitted a draft note and deed of trust to Hahn for a property tax loan, but the loan was never consummated. Hahn would not agree to AMG's proposed 10 percent interest rate.

In December 2011, Hahn notified AMG that the Property was to be sold at a tax auction in March 2012. On or around March 13, 2012, in order to save the Property from being sold at the tax auction, AMG paid $203,296.12 to cure the delinquent property taxes. The tax collector had not agreed to postpone the auction, so if AMG had not paid the taxes, the Property would have been sold.

On March 18, 2012, AMG notified Hahn it was in default of the First Deed of Trust. Hahn never tendered or made any payments on the principal of the $60,500 loan or delinquent taxes paid by AMG. On April 2, 2012, a Notice of Default and Election to Sell under the First Deed of Trust was recorded and days later served on Hahn. AMG acquired the Property at the foreclosure sale with a credit bid in the amount of $275,905.24.

In August 2012, AMG and Alex Hahn were sued by several Hahn partners. Alex Hahn cross-complained against AMG alleging it breached the purchase agreement by foreclosing on the Property in order to improperly obtain title. In March 2014, Hahn filed an amended cross-complaint against AMG, asserting 12 causes of action including wrongful foreclosure, breach of the covenant of good faith and fair dealing, quiet title, negligence, and fraud.

The case proceeded to a nine-day bench trial on 11 causes of action.[1] In April 2016, the trial court issued its statement of decision and judgment in favor of AMG on all claims. Hahn now appeals.

[1] A cause of action for negligence had been summarily adjudicated in AMG's favor.

DISCUSSION

A. Standard of Review

" 'In general, in reviewing a judgment based upon a statement of decision following a bench trial, "any conflict in the evidence or reasonable inferences to be drawn from the facts will be resolved in support of the determination of the trial court decision. [Citations.]" [Citation.] In a substantial evidence challenge to a judgment, the appellate court will "consider all of the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference, and resolving conflicts in support of the [findings]. [Citations.]" [Citation.]' " (*Cuiellette v. City of Los Angeles* (2011) 194 Cal.App.4th 757, 765.) However, where the material facts are not in dispute and the parties present the appellate court with questions of law, such questions are reviewed de novo. (*Ibid.*) The interpretation of written instruments is also reviewed under the independent, or de novo standard. (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865-866.)

B. Wrongful Foreclosure

1. Breach of Addendum 4

Hahn first argues that AMG breached the parties' agreement because Hahn had until the close of escrow to pay off the $60,500 note "regardless of when it was otherwise 'due.' " According to Hahn, since the $60,500 debt was not yet due, AMG was wrong to foreclose based on Hahn's nonpayment.

AMG relied upon the acceleration clause in the First Deed of Trust to demand payment of the $60,500 note upon Hahn's default in the payment of property taxes. In relevant part, paragraph B.6. states "[t]hat upon default by [Hahn] in payment of any indebtedness secured hereby or in performance of any agreement hereunder, [AMG] may declare all sums secured hereby immediately due and payable by delivery to Trustee of written declaration of default and demand for sale and of written notice of default and of election to cause to be sold said property, which notice shall cause to be filed for record. Beneficiary also shall deposit with Trustee this Deed, said note and all documents evidencing expenditures secured hereby." Part of Hahn's performance under the First

Deed of Trust was to pay "before delinquency all taxes and assessments affecting said property."

Notwithstanding the First Deed of Trust, Hahn relies upon the language of Addendum 4 to argue no payment was due when AMG demanded it. Paragraph 7 states with respect to $60,500 loan: "[Hahn] may elect to repay the said loan by repaying out of the cash payment due to it upon the close of escrow." Paragraph 6 adds that AMG's payment to Hahn for the Property "shall be subject to offset for any loans to be repaid by [Hahn] to [AMG] and due on or before the closing and any other charges and expenses that [Hahn] is obligated to pay [AMG] in connection herewith. Based on these provisions, Hahn argues AMG had agreed that the maturity date of the $60,500 loan was extended to the close of escrow.

Two cases cited by neither party are instructive. In *Burrill v. Robert Marsh & Co.* (1934) 138 Cal.App.101, the defendant signed a series of promissory notes to be repaid April 1, 1930, with semiannual interest payments required before the maturity date. (*Id.* at pp. 102-103.) Each of the notes contained an acceleration clause, which stated, " 'If default be made in the payment of any interest coupons or any portion thereof, for the space of thirty days, the principal sum and all unpaid interest shall, any time thereafter, at the option of the holder of this note, become immediately due and collectable without further notice.' " (*Id.* at p. 105.) No interest payments were made on October 1, 1927, or April 1, 1928. (*Id.* at p. 103.) On July 17, 1928, the plaintiff sued to enforce payment of the principal and accrued interest. (*Ibid*.) The defendants moved for nonsuit, arguing in part that the action was premature since the defendants guaranteed payment of the note " 'at maturity' " and this meant April 1, 1930, regardless of the acceleration clause. (*Id.* at p. 104.) The court rejected the argument that "maturity" could only be construed to mean April 1, 1930, the due date specified in the note. (*Id.* at p. 106.) It stated, "[T]he term 'maturity,' . . . when read with the acceleration provisions of the note and the considerations that may be fairly said to have entered into the making of the contract, would seem to justify a broader interpretation than that urged by appellants. . . . [W]e are of the opinion that the term 'maturity'. . . should be construed to mean the date when the

holder of the notes had a legal right to begin action to force payment thereof." (*Id.* at p. 106.) The court recognized the April 1, 1930 maturity date could be advanced upon default and affirmed the judgment for the plaintiff. (*Id.* at p. 107.)

In *First-Trust Joint Stock Land Bank of Chicago v. Meredith* (1936) 5 Cal.2d 214 (*First-Trust*), the plaintiff sued on a promissory note, dated September 27, 1923, secured by a mortgage. (*Id.* at p. 216.) The note provided that both principal and interest were payable in 68 semiannual installments of $1,300 each, beginning on May 1, 1924, and ending on May 1, 1958. (*Ibid*.) The promissory note contained no acceleration clause in case of default, but the mortgage deed provided that, in case of default in the payment of any installment, the mortgagee might "without notice declare the entire debt immediately 'due and payable,' and thereupon the mortgagee should be entitled to immediate possession and appointment of a receiver, and to foreclosure of the mortgage." (*Ibid*.) The plaintiff mortgagee alleged the defendant failed to pay the installment due on November 1, 1931, and exercised its option to declare the entire debt due and payable. (*Ibid*.) The court entered judgment for the plaintiff for the entire unpaid balance of principal and interest. (*Id.* at p. 217.) On appeal, the defendant argued the plaintiff's recovery should have been limited to the installment amount that was due on November 1, 1931. (*Id.* at p. 218.) Although the court reversed the judgment on other grounds, it rejected the defendant's argument premised on the absence of an acceleration clause in the note. It explained the terms of the promissory note were governed by the acceleration clause contained in the mortgage deed, because "the note and mortgage should be construed together and be read as one contract." (*Id.* at pp. 218-219, 222.) We apply these longstanding principles from *Burrill* and *First-Trust*. In this case, it is undisputed that Hahn borrowed $60,500 from AMG secured by the First Deed of Trust, which contained an acceleration clause allowing AMG to make the entire amount "immediately due and payable" in the event Hahn defaulted on its obligations. One of those obligations was "[t]o pay, at least ten days before delinquency all taxes and assessments affecting" the Property. Even though Addendum 4 contained no acceleration clause, and purported to extend the maturity of the loan to the close of escrow, as *First-Trust* shows, the First

Deed of Trust and Addendum 4 must be construed together and harmonized since they arose between the same parties from the same transaction. (*First-Trust*, *supra*, 5 Cal.2d at pp. 218-219; Civ. Code, § 1642 ["Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together."].) Thus, Addendum 4, which established the last agreed-upon maturity date for the $60,500 loan and the First Deed of Trust, must be read in harmony to give effect to each. (See *First-Trust*, *supra*, 5 Cal.2d at p. 218.) Taken together, AMG was well within its right to accelerate the $60,500 loan pursuant to the First Deed of Trust after Hahn defaulted on the property taxes. In the circumstances, it was not a breach of Addendum 4 for AMG to demand payment sooner than "upon the close of escrow."

"An acceleration clause advances the date of payment of future installments when there is default in a payment." (*Aristocrat Highway Displays, Inc. v. Stricklen* (1945) 68 Cal.App.2d 788, 791-792.) "The term 'acceleration clause' refers to the provision in a promissory note or trust deed that requires payment of the total unpaid balance of the principal and interest on the occurrence of a specified event or events and *before the obligation otherwise matures*." (5 Miller & Starr, Cal. Real Estate (4th ed. 2015) § 13:130, p. 488, italics added; see 27 Cal.Jur.3d (2011) Deeds of Trust, § 184 ["An 'acceleration' clause in a trust deed transaction ordinarily refers to a provision in the instrument or promissory note accompanying it that permits the lender, or beneficiary, to demand payment of the total unpaid balance of the principal and interest, upon the happening of specified events, *prior to the maturity date of the obligation*." (Italics added, fns. omitted)].) It was proper for the acceleration clause between the parties to operate that way here, as well.

Hahn contends AMG could not rely on the "boilerplate Deed of Trust" because it agreed in Addendum 4 that any debts from Hahn to AMG that were "due on or before the closing" could be paid at the close of escrow. Hahn says this "clear language" of Addendum 4 allowed it to repay the loan upon the close of escrow, and AMG was wrong to declare all sums due immediately and foreclose. We disagree. Hahn has not argued nor is there any basis for us to conclude the terms of the First Deed of Trust were

cancelled or superseded by the terms of Addendum 4. Nothing in Addendum 4 expresses any such intent, and Hahn makes no argument that the two agreements are in conflict. In fact, Hahn acknowledges the acceleration clause in the First Deed of Trust "does not conflict with the parties' [purchase agreement] and various Addenda." Since there is no conflict between the First Deed of Trust's default and acceleration provisions and Addendum 4's maturity date, the "specially prepared" language of Addendum 4 does not prevail over the language of the deed, as Hahn urges. (See *Prudential Realty Etc. Co. v. Clarewood Co.* (1960) 187 Cal.App.2d 320, 322 [harmonization between written and printed parts of contract necessary only where there is absolute inconsistency].)

Hahn further argues AMG waived its right to accelerate the debt. Hahn states that by 2005, AMG was aware of Hahn's failure to keep property taxes current, so it was improper for AMG to act on that failure in 2012 as a basis for accelerating payment and foreclosure. This is not persuasive either. While AMG knew of various liens for delinquent property taxes months after entering the purchase agreement, Hahn made repeated efforts to cure the default, or at least represented as much to AMG. In February 2010, Gevorgian asked Charles Hahn, "[W]hat is the status on the property tax lien foreclosure?" Charles Hahn responded, "Yes, we are almost done resolving that issue." In December 2010, Charles Hahn informed AMG there was a payment plan in the works for one of the parcels. While noting that Hahn did not have the funds to pay off all the outstanding taxes, he also stated, "We hope that if we close the deal, Hahn and Kang Equity LLC will pay for all the tax liens." As found by the trial court, it was not until March 2012—when it became clear that the parties risked losing the Property in a tax auction—that AMG paid the $203,296.12 in delinquent property taxes. If AMG had not paid the taxes when it did, the Property would have been lost. It was reasonable for AMG to trigger the acceleration clause and declare all sums due on April 2, 2012, the date of the Notice of Default and Election to Sell Under Deed of Trust. AMG exercised the acceleration clause within a reasonable time.

2. Good Faith & Fair Dealing, Estoppel, and Forfeiture

Next, Hahn argues the foreclosure was barred by application of the covenant of good faith and fair dealing and by principles of estoppel and forfeiture.

A covenant of good faith and fair dealing exists in every contract to prevent one contracting party from unfairly frustrating the other party's right to receive the benefits of the agreement. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 349 (*Guz*).) "The implied covenant of good faith and fair dealing rests upon the existence of some specific contractual obligation. [Citation.] 'The covenant of good faith is read into contracts in order to protect the express covenants or promises of the contract, not to protect some general public policy interest not directly tied to the contract's purpose.' [Citation.] . . . 'In essence, the covenant is implied as a *supplement* to the express contractual covenants, to prevent a contracting party from engaging in conduct which (while not technically transgressing the express covenants) frustrates the other party's rights to the benefits of the contract.' " (*Racine & Laramie, Ltd. v. Department of Parks & Recreation* (1992) 11 Cal.App.4th 1026, 1031-1032 (*Racine*), original italics.) " 'The implied covenant of good faith and fair dealing is limited to assuring compliance with the *express terms* of the contract, and cannot be extended to create obligations not contemplated by the contract.' " (*Pasadena Live v. City of Pasadena* (2004) 114 Cal.App.4th 1089, 1094, original italics.) "It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." (*Guz*, *supra*, 24 Cal.4th at pp. 349-350.)

Hahn identifies several ways AMG's foreclosure breached this implied covenant. None do.[2]

Hahn contends AMG breached the implied covenant because the agreement was in effect and escrow was open when it accelerated the debt and foreclosed in contravention

[2] In addition to the alleged breaches discussed here, Hahn also contends AMG breached the covenant of good faith and fair dealing with "bad faith 'bait and switch' tactics" with respect to the $200,000 loan AMG extended to Hahn in March 2010. We address this argument below in our discussion of that loan.

of Addendum 4. In *Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, the Supreme Court held that an implied covenant of good faith and fair dealing cannot contradict the express terms of a contract. The court stated: "We are aware of no reported case in which a court has held the covenant of good faith may be read to prohibit a party from doing that which is expressly permitted by an agreement." (*Id.* at p. 374.) We have already established that the agreement expressly permitted AMG to accelerate the debt when Hahn defaulted on property taxes. That act is not grounds for breach of the implied covenant of good faith and fair dealing.

Hahn further argues AMG breached the implied covenant by employing "bait and switch" tactics regarding the payment of property taxes. Hahn asserts: "In May 2011, the parties agreed that AMG would loan Hahn $231,500 to pay the defaulted taxes before the tax sale of the Property . . . . Despite Hahn's numerous efforts to obtain the tax loan from AMG, and AMG's express assurances regarding the same in May 2011, AMG reneged on its agreement, paid the defaulted taxes three days before the tax sale without Hahn's knowledge, declared a default under the $60,500 Note based on the tax payment, and foreclosed on the Property." Not so. The parties tried to negotiate a tax loan, but the trial court concluded that "as a matter of law, there was no agreement between the parties for a loan by AMG to Hahn to pay the delinquent property taxes," and its conclusion is supported by substantial evidence. In May 2011, Gevorgian sent Hahn a draft promissory note and deed of trust for a loan to cover the delinquent property taxes , opened an escrow with Chicago Title Company to process the loan, and had Chicago Title prepare a "Borrower Estimated Closing Statement," showing the amount of the "New Loan Charges." The draft promissory note and deed of trust indicated that the loan was to be at 10 percent prepaid interest for two years with one point for a total proposed loan amount of $231,500. Alex Hahn testified that he countered this proposal with a 5 percent interest rate. Thus, no mutual consent was reached to form a contract. Moreover, no signed promissory note or deed of trust was ever admitted into evidence. Gevorgian, who the trial court found to be more credible than Alex Hahn, testified that he never received an executed note and deed of trust for the tax loan. This was substantial

evidence supporting the trial court's conclusion that the parties never reached agreement on a tax loan. There is no basis to conclude AMG breached the implied covenant of good faith and fair dealing by reneging on an agreement that never existed.

Likewise, Hahn's estoppel and forfeiture arguments provide no grounds for reversal. Both arguments are premised on contentions that are discussed and rejected above.

3. Tender Requirement

The trial court concluded Hahn's wrongful foreclosure claim also failed for the lack of tender. Hahn argues it was not required to tender.

The tender requirement applies when a defaulted borrower seeks to set aside a trustee's sale on grounds that the sale is voidable because of irregularities in notice or procedure. (See, e.g., *Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 112 (*Lona*).) In order to maintain a cause of action to void a foreclosure sale, the debtor must tender any amounts due under the deed of trust. (*Dimock v. Emerald Properties* (2000) 81 Cal.App.4th 868, 877.) There are several exceptions to the tender requirement, including one where circumstances make it inequitable for the lender to enforce the debt. (*Lona, supra,* 202 Cal.App.4th at p. 113.)

Here, there is no disagreement that Hahn did not tender the sums due. Rather, Hahn says that its challenge to the foreclosure "was not rooted in [the] procedural irregularities" which generally require tender but rather on Addendum 4's substantive language extending the debt until the close of escrow. For this reason, Hahn also contends the equitable exception to tender applied. Neither reason warrants an exception. In light of our conclusion with respect to the operation of Addendum 4 and the acceleration clause in the First Deed of Trust, Hahn's failure to tender was a proper independent basis for the court to deny relief.

4. Joint Venture

Finally, Hahn argues AMG breached the heightened duties owed between joint venturers. Hahn asserts that as a co-venturer, AMG owed Hahn a heightened duty of

loyalty and good faith and was not permitted to take an "unfair advantage" or to enjoy greater rights than called for by the terms of the PSA or its addenda.

" 'A joint venture . . . is an undertaking by two or more persons jointly to carry out a single business enterprise for profit.' " (*Unruh-Haxton v. Regents of University of California* (2008) 162 Cal.App.4th 343, 370.) "A joint venture exists when there is 'an agreement between the parties under which they have a community of interest, that is, a joint interest, in a common business undertaking, and understanding as to the sharing of profits and losses, and a right of joint control.' " (*Connor v. Great Western Sav. & Loan Assn.* (1968) 69 Cal.2d 850, 863.) The creation of a joint venture requires little formality (*Gross v. Raeburn* (1963) 219 Cal.App.2d 792, 801). It may be the result of a parol agreement or it may be assumed as a reasonable deduction from the acts and declarations of the parties. (*Nelson v. Abraham* (1947) 29 Cal.2d 745, 749-750 (*Nelson*).) The existence or nonexistence of a joint venture is a question of fact for the jury to resolve. (*Kaljian v. Menezes* (1995) 36 Cal.App.4th 573, 586.)

This argument is waived. " '[I]t is fundamental that a reviewing court will ordinarily not consider claims made for the first time on appeal which could have been but were not presented to the trial court. . . . '[W]e ignore arguments, authority, and facts not presented and litigated in the trial court. Generally, issues raised for the first time on appeal which were not litigated in the trial court are waived.' " (*Newton v. Clemons* (2003) 110 Cal.App.4th 1, 11, fn. omitted.) Since Hahn did not present or litigate this factual issue in the trial court, we will not consider it for the first time on appeal.

Even assuming arguendo the issue has not been waived, the claim is meritless. The essential element of a joint venture is an undertaking by two or more persons to carry out a single business enterprise jointly for profit. (See *Nelson v. Abraham*, *supra*, 29 Cal.2d at p. 749.) Hahn has not identified any evidence in the record, nor have we, indicating the parties had agreed to jointly undertake a business enterprise for profit. For such evidence, Hahn points to Addendum 4, which he claims "established, without dispute, the cost and upside sharing relationship between AMG and Hahn that gave rise to a joint venture relationship and related fiduciary duties." In particular, Hahn focuses

on the provisions which reduced AMG's purchase price for the Property and provided Hahn with retail space in the Property's ground floor once developed. This is not persuasive. Nothing in Addendum 4 refers directly to a joint venture or expressly provides for joint control over the property. Nor did the promised transfer of retail space to Hahn establish a common business enterprise. The retail space was the consideration for a negotiated reduction in AMG's purchase price. Nothing in this arrangement or in the record indicates profit sharing between the parties, a basic element of a joint venture. (See *Jeld-Wen, Inc. v. Superior Court* (2005) 131 Cal.App.4th 853, 872-873.)

Accordingly, there is no basis to conclude AMG's foreclosure on the property was wrongful.

C. $200,000 Loan

Hahn states it should have prevailed on its breach of contract and breach of the covenant of good faith and fair dealing claims for a reason independent of wrongful foreclosure. Hahn argues AMG separately breached Addendum 4 by loaning it $200,000 for "environmental cleanup," denying it had made a loan for that purpose, and instead directing the funds to its entitlement efforts. In so doing, Hahn contends AMG "effectively sabotaged [their] deal" because closing escrow was tied to cleanup of the Property and cleanup was never completed.

The parties do not appear to dispute that Addendum 4 contemplates two loans beyond the $60,500 loan secured by the First Deed of Trust. Indeed, Addendum 4 refers to second and third deeds of trust to secure separate loans or lines of credit.

A line of credit from Pacific Companies, an AMG-affiliated entity, secured by a second deed of trust, is mentioned in paragraph 4 and detailed in paragraph 8. The latter paragraph states, "This amendment shall not become effective until and unless the Pacific Companies . . . agree[] to make available to [Hahn] a credit line of up to $100,000 which shall be used for the sole purpose of completing any environmental documents and related legal fees that are required in order to meet the environmental approvals set forth by the City of Oakland and all other applicable public agencies." Paragraph 9 adds, "Upon obtaining the said credit approval from the Pacific Companies, [AMG] shall select

City approved and required land use environmental consultant and project processor, contract, retain, supervise, and control project consultants to diligently pursue receiving the environmental approvals from all relevant agencies for [AMG's] intended use for the subject property and shall authorize the Pacific Companies to pay, as such payments are directly drawn from the said credit line, such consultants after [Hahn] approves the bills and invoices from such consultants. The said credit line shall be secured by the second deed of trust."

A possible third loan is discussed earlier in Addendum 4. Hahn and AMG agreed to "cooperate with each other to obtain all regulatory and governmental permits and approvals in regard to any contamination at the [Property]." Hahn was "responsible for all environmental cleanup as required by the City of Oakland and all environmental regulatory agencies." AMG had "no obligation to clean [the Property]" but "shall have the right to clean [it] in its sole discretion." Paragraph 3 provides: "If [Hahn] has not commenced and contracted for the clean up within two (2) months after all discretionary approvals have been obtained by [AMG] for its intended use, [AMG] has the right to clean the site per the terms" of the addendum. Under paragraph 4, if AMG elects to do the cleanup "after first having offered [Hahn] the opportunity to clean the property and [Hahn] has refused, the cost of cleanup shall be paid through a third loan (third to the current first deed of trust for $60,500 and the second deed of trust mentioned in Paragraph 8 of this agreement) secured by the property at a rate of 12% per annum." Paragraph 5 provides "[t]he cost of cleanup, if incurred by [AMG], shall be repaid in cash at the close of escrow provided that [Hahn] pre-approved such cost prior [to] it being incurred. . . . Upon commencing the cleanup activities, [AMG] shall exercise reasonable diligence to minimize and control the cost and to expedite the process and shall report to and consult with [Hahn] from time to time or upon [Hahn's] request."

No one argues that Addendum 4 did not contemplate two separate loans. But Hahn disputes the purpose of the $200,000 from AMG. Hahn asserts this loan was for the "environmental cleanup" referred to in paragraphs 3 through 5 of Addendum 4. AMG argues the loan was for the EIR as the "environmental documents" referenced in

paragraphs 8 and 9. The trial court found the $200,000 loan was not for cleanup but rather to produce the environmental documents. Substantial evidence supports this conclusion.

The parties' course of conduct demonstrated they were acting pursuant to paragraphs 8 and 9. On March 1, 2010, Gevorgian requested and Hahn approved the city-approved consultant Urban Planning Partners. On April 21, 2010, Hahn was requested to confirm "the loan was made by AMG and not by Pacific Companies. Please confirm that this is an amendment to our agreement to replace Pacific with AMG as lender. The amendment is now effective as AMG made the loan in lieu of Pacific Companies." In the same email, Gevorgian told Hahn "[Urban Planning Partners] is the best I have seen and they have done many focused EIR's such as the one that you are doing now. [¶] Please let me know if you and Alex accept the above so that I can inform the City and [Urban Planning Partners]." Charles Hahn responded, "Alex Hahn approves." Approximately a week later, Gevorgian sent Hahn the closing statement for the $200,000 loan, noting the hourly rates for the consultant "for the EIR" and requesting Hahn confirm the rates. The following day, Hahn approved. These discussions, especially the agreed-upon substitution of AMG for Pacific Companies and the approval of City-endorsed consultants, adhere more closely with the line of credit for environmental planning documents than the loan for environmental cleanup.

Further, apart from the loan amount, the sequence of events and terms of the $200,000 loan generally align more with the credit line for environmental planning documents than the potential loan for environmental cleanup. The $200,000 loan was the second one between the parties, which corresponds with the order of the environmental planning loan in paragraph 8 of the addendum. The $200,000 loan also bore 10 percent interest whereas the potential loan for environmental cleanup was to be at 12 percent per annum. There is no question the $200,000 loan was double the amount stated in paragraph 8, but it was capped, which was consistent with the loan described in paragraph 8. No amount was stated for the potential loan for environmental cleanup, and it had no cap.

Hahn says the trial court and AMG disregarded the 2010 straight note for the $200,000 loan "as if it does not exist." The note states in relevant part: "For value received, all of the undersigned [Hahn], jointly and severally promise to pay to [AMG] . . . the principal sum of **up to a maximum** of $200,000.00 Dollars (two hundred thousand), with interest from the date of each 'Draw' until paid . . . . Each Draw shall be for the sole purpose of government fees and the consulting reports required to process of the Environmental Review as required by the City of Oakland and Environmental Cleanup as required by the City of Oakland for the Project." The "Environmental Cleanup" language provides Hahn's most compelling support that the $200,000 loan was for remediation, but it does not carry the day. In addition to "Environmental Cleanup," the straight note describes as part of its "sole purpose" the "government fees and the consulting reports required to process . . . the Environmental Review as required by the City of Oakland." Hahn downplays this other expressly stated purpose. At best for Hahn, two "sole purposes" may render the note ambiguous. In the face of such ambiguity, we determine what the parties intended. (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 18.) The contract must be understood with reference to the circumstances under which it was made and the matter to which it relates. (*Mountain Air Enterprises, LLC v. Sundowner Towers, LLC* (2017) 3 Cal.5th 744, 752; see *Frankel v. Board of Dental Examiners* (1996) 46 Cal.App.4th 534, 544 ["[W]here the language of the contract is ambiguous, it is the duty of the court to resolve the ambiguity by taking into account all the facts, circumstances and conditions surrounding the execution of the contract."].) In consideration of the evidence, we reach the same conclusion as the trial court. The loan was for the preparation of environmental planning documents.

Hahn also says it "rightfully expected that the additional $200,000 debt that [it] undertook at 10 percent interest would be applied as stated in the Note itself—i.e., for the environmental cleanup." Even if that was Hahn's expectation, it was neither correct nor in line with the agreement. Paragraph 5 of Addendum 4 states Hahn "shall . . . be responsible for its own review of the clean up progress every 2 weeks and shall inform [AMG] of any grievances and concerns it discovers in connection with the process

immediately." Addendum 4 also allowed Hahn to "take over the clean up process . . . upon [AMG's] breach of its duties to exercise reasonable diligence and competency." Had Hahn undertaken any review of the work being paid for with the $200,000 loan, it would have been apparent the loan was being directed to EIR consultants and not toward remediation. Hahn makes no claim, nor is there any indication in the record, that the type of review associated with the environmental cleanup loan was ever done.

Lastly, AMG's conduct related to the $200,000 loan did not constitute a breach of good faith and fair dealing. This particular argument is not developed by Hahn in its briefs, so we need not consider it. (See *Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956.) In any event, such an argument would fail. Even if Hahn thought the loan was to take care of its obligations to clean the Property, there was no express contractual obligation that required AMG to make a loan for environmental cleanup. The duty of good faith and fair dealing cannot impose duties on AMG beyond its agreement with Hahn. (See *Racine, supra,* 11 Cal.App.4th at pp. 1031-1032.)

D. AMG's Affirmative Defenses

Finally, Hahn contends the trial court's judgment is not supported by AMG's affirmative defenses. The trial court ruled for AMG on three of its affirmative defenses: unclean hands, estoppel, and laches. In light of our conclusions on all of Hahn's claims, we need not address AMG's affirmative defenses.

DISPOSITION

The judgment is affirmed. AMG is awarded costs on appeal.

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Siggins, P.J.

WE CONCUR:

_____
Fujisaki, J.

_____
Petrou, J.